



April 6, 2001

Ms. Tenley A. Aldredge
Assistant County Attorney
Travis County
P.O. Box 1748
Austin, Texas 78767

OR2001-1378

Dear Ms. Aldredge:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID # 145852.

The Travis County Attorney (the "county attorney") received a request for a letter that was submitted to this office in connection with a request for an open records decision. We addressed the county attorney's request for a decision in Open Records Letter Ruling No. 2001-1039 (2001). Ordinarily, we consider a governmental body's communications to this office, stating why requested information should be withheld from public disclosure, to be available to the public. *See* Open Records Decision No. 459 at 2 (1987). But you claim that portions of the county attorney's letter are excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, and 552.111 of the Government Code. We have considered the exceptions you raise and have reviewed the information you seek to withhold.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that is made confidential by another statute. You have marked portions of your letter that you claim are confidential under article 20.02 of the Code of Criminal Procedure. Article 20.02(a) provides that "[t]he proceedings of the grand jury shall be secret." You assert that the marked information "reveal[s] the testimony and evidence used by the Grand Jury in their deliberations[.]" Having considered your arguments and reviewed the information in question, we have marked information that is confidential under article 20.02(a) of the Code of Criminal Procedure. You must withhold that information under section 552.101 of the Government Code. *See also* Open Records Decision No. 513 at 4 (1988) (stating that information should be withheld if its release would reveal the grand jury's deliberations).

You claim that other information contained in your letter is excepted from disclosure under section 552.103 of the Government Code. Section 552.103, the "litigation exception," provides in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that raises section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To sustain its burden, the governmental body must demonstrate: (1) that litigation is pending or reasonably anticipated on the date that the governmental body receives the request for information and (2) that the information in question is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both components of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

You assert that your letter contains information pertaining to a key issue in criminal litigation that is pending in the Travis County District Attorney's Office. We have reviewed that information. But your arguments do not persuade us that the information in question may be withheld from the requestor under section 552.103. *See* Open Records Decision No. 143 at 4 (1976) (stating that statutory predecessor does not protect general information that is normally public and only indirectly relates to litigation).

You also raise section 552.107 of the Government Code, which excepts information from disclosure "if . . . a court by order has prohibited disclosure of the information." Gov't Code § 552.107(2). You have provided a copy of a "Restrictive and Protective Order" issued by the 167th District Court of Travis County on December 14, 1999, in *State of Texas v. Robert*

Springsteen, et al., No. 99-8330, *et al.*¹ You believe that the order may require the withholding of portions of your letter that describe the order and the matters to which it pertains. Having reviewed that information and the order, we conclude that the information is not excepted from disclosure under section 552.107(2).

You also seek to withhold parts of your letter under section 552.108 of the Government Code, the "law enforcement exception." Section 552.108 provides in relevant part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime; [or]

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

...

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution; [or]

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(1)-(2), (b)(1)-(2). A governmental body that raises section 552.108 must reasonably explain, if the requested information does not supply the explanation on its face, how and why the release of that information would interfere with law enforcement. *See* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

¹The order provides that "[t]he attorneys, investigators, employees or other persons assisting or associated with either the prosecution or defense . . . under the above-listed cause numbers or any subsequent cause numbers . . . shall be prohibited from making extrajudicial statements that a reasonable person would expect to be disseminated by means of public communication, if the lawyer or his staff knows or reasonably should know that the statements will have a substantial likelihood of materially prejudicing the trial of this cause."

We have reviewed the information that you claim is excepted from disclosure under section 552.108 and have considered your arguments. But we conclude that neither the county attorney nor the district attorney has established how or why the release of any of the information in question would interfere with any pending criminal investigation or prosecution. Accordingly, none of the information contained in your letter may be withheld from the requestor under section 552.108. *See also* Gov't Code § 552.108(c) (providing that section 552.108 does not protect basic information about an arrested person, an arrest, or a crime); *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 186-87 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 at 3-4 (1976) (summarizing the types of information deemed public by *Houston Chronicle*).

Lastly, you contend that your letter contains information that is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." The purpose of section 552.111 is to protect advice, opinion, and recommendation used in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ). We determined that section 552.111 excepts from public disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, No. 03-00-00219-CV, 2001 WL 23169 (Tex. App. -- Austin 2001, no pet. h.). Upon careful review, we conclude that your letter does not contain advice, opinions, or recommendations that are excepted from disclosure under section 552.111.

In summary, one portion of your letter relating to grand jury deliberations is confidential under article 20.02(a) of the Code of Criminal Procedure. You must withhold that information under section 552.101 of the Government Code. You must release the rest of your letter to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by

filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

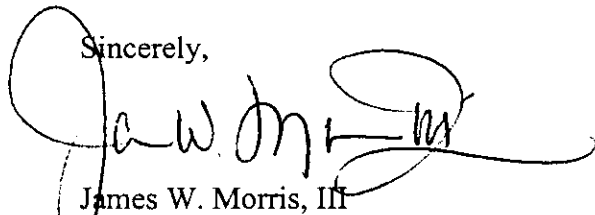
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/er

Ref: ID# 145852

Encl. Marked documents

cc: Mr. David Hafetz
Austin American-Statesman
P.O. Box 670
Austin, Texas 78767
(w/o enclosures)